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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ANGELIQUE ROCHELLE, Plaintiff and Appellant, v. TREVOR DENG, Defendant and Respondent.	A154400, A155054 (City & County of San Francisco Super. Ct. No. CGC-16-555761)

Plaintiff tenant Angelique Rochelle was served with a relative move-in eviction notice by defendant landlord Trevor Deng. Twelve days later, the parties entered into a contract whereby Deng would pay Rochelle $25,000 to move out. Rochelle sued Deng upon learning he had remodeled and re-rented the unit. After trial, the jury returned a special verdict and judgment was entered in favor of Deng. Rochelle moved for a new trial on multiple grounds, including that evidentiary errors, instructional errors, and jury misconduct warranted a new trial. The trial court denied the motion. An amended judgment was entered awarding attorney fees to Deng. Rochelle appeals the judgment and order denying the motion for new trial, as well as the amended judgment. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

From 2003 to 2014, Rochelle rented a unit located on 25th Avenue in San Francisco. During that time, Deng and his wife purchased the property

and moved into the unit upstairs. The building was subject to the San Francisco Residential Rent Stabilization and Arbitration Ordinance (Rent Ordinance) (codified as S.F. Admin. Code, ch. 37).

On June 13, 2014, Deng served Rochelle with a relative move-in eviction notice, pursuant to section 37.9, subdivision (a)(8) of the Rent Ordinance. The notice stated that Deng sought to recover possession of the unit Rochelle was renting for use as the principal place of residence for Deng's mother. It also stated that each eligible tenant residing at the property was entitled to receive relocation costs of $5,261, with a cap of $15,783 per unit.

According to Deng, Rochelle approached him later and said that for $25,000, she would move out and then he could do whatever he wanted with the unit.

On June 25, 2014, Rochelle and Deng signed a contract stating that Deng would "provide compensation exactly $25,000 to terminate tenancy by Angelique Rochelle" and Rochelle would move out by July 8th. The contract stated that if Rochelle should "fail to timely vacate the subject premise [*sic*] on or before July 8th, 2014," then Rochelle "must refund the full $25,000 immediately and a lawsuit shall be immediately filed to effect the summary removal therefrom." Rochelle received the payment, vacated the unit, and moved to Oakland.

According to Rochelle, she learned over two years later that Deng's mother had not moved into the unit and that Deng had renovated and re-rented it. Rochelle filed this action.[1]

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[1] Rochelle's first amended complaint asserted claims on behalf of herself and her children, and named Deng, his wife, and his mother as defendants. The children's claims were subsequently settled, and the action was dismissed as to Deng's wife and mother.

Rochelle's claims for violation of Rent Ordinance section 37.9 (relative move-in), intentional misrepresentation, breach of warranty of quiet enjoyment, and violation of Rent Ordinance section 37.10 (tenant harassment) were submitted to a jury.

Both parties filed multiple motions in limine, including Rochelle's motion to exclude the contract as void, Rochelle's motion to exclude the testimony of Deng's economic damages expert, and Deng's motion to exclude evidence as protected by the litigation privilege. These three motions in limine were denied. Deng requested a nonsuit on multiple grounds, including that the litigation privilege precluded Rochelle from establishing the elements of a wrongful eviction. The request was denied.

At trial, both parties called fact and expert witnesses to testify, including expert witnesses Richard Devine (for plaintiff) and Eric Drabkin (for defendant) who testified as to their respective calculations of Rochelle's economic damages.

During discussion among the trial court and counsel on jury instructions, Deng's counsel requested that the instruction entitled "San Francisco Rent Ordinance: Relative Move In" be modified. Section 37.9, subdivision (a)(8) of the Rent Ordinance provides that a landlord shall not endeavor to recover possession of a rental unit unless the landlord "seeks to recover possession in good faith, without ulterior reasons and with honest intent . . . ." Deng's counsel requested that the phrase "without ulterior reasons and with honest intent" be omitted. Rochelle's counsel objected. The trial court stated that Rochelle's counsel could still argue it to the jury but concluded: "I don't think that the language 'without ulterior reasons' and 'with honest intent' adds anything. [¶] I think that those things are

encompassed within the idea of good faith, and that additional language is only going to be confusing to the jury."

During deliberations, the jury submitted multiple questions to the trial court. The first question asked: "If, after an eviction is served, and a contract is mutually agreed upon, do the original terms of the eviction still apply and are enforceable?" (*Sic.*) The question and response were discussed with counsel. The trial court responded: "If the contract was mutually agreed upon, then the eviction proceedings terminated on the date of the contract. Please answer all the questions on the verdict form."

The jury returned a special verdict, finding that Rochelle and Deng had entered into a contract and that Rochelle's consent to the contract was not obtained by unfair pressure or fraud. The jury found that Deng sought to recover possession of the unit in good faith with the relative move-in eviction notice and had not made a misrepresentation in the notice. The jury found that Deng had not engaged in tenant harassment or interfered with Rochelle's use and enjoyment of the unit. The trial court entered judgment in favor of Deng and against Rochelle.

Rochelle filed a motion for judgment notwithstanding the verdict. The trial court denied the motion. Rochelle also filed a motion for new trial, arguing there were evidentiary errors, instructional errors, jury misconduct, and insufficient evidence justifying the verdict that warranted a new trial. Both parties submitted juror affidavits. The trial court denied the motion for new trial, finding the juror declarations submitted by Rochelle were inadmissible, there was substantial evidence to support the jury's special verdict findings, it was not improper for Deng's damages expert to testify, the order of the verdict form was proper, and the exclusion of terms from the Relative Move In jury instruction and verdict form was proper because the

terms were vague and ambiguous. This appeal of the judgment and order denying her motion for new trial followed.

Deng submitted a memorandum of costs and filed a motion for attorney fees. The trial court entered an amended judgment in favor of Deng in the amount of $148,375.12. Rochelle appealed the amended judgment. The two appeals were consolidated.

DISCUSSION

Rochelle raises eight primary arguments in this consolidated appeal. She argues that the trial court made two evidentiary errors by: (1) declining to exclude the contract as void; and (2) declining to exclude testimony by Deng's economic damages expert because his methodology was contrary to law. Rochelle argues that the trial court made two instructional errors by: (1) modifying ordinance language in the "San Francisco Rent Ordinance: Relative Move In" jury instruction; and (2) providing a response to a jury question that was contrary to law. She argues that the trial court made two decisional errors on her motion for new trial by: (1) finding juror affidavits evidencing jury misconduct inadmissible; and (2) not finding jury misconduct based on the facts in those affidavits.

Rochelle contends that these evidentiary, instructional, and decisional errors were individually prejudicial, but argues in the alternative that their "cumulative effect" warrants a new trial. Finally, Rochelle argues that the amended judgment awarding attorney fees to Deng should be reversed to the extent the judgment is reversed or a new trial is ordered. We address each of these arguments in turn.

I. EVIDENTIARY ERROR ARGUMENTS

A. Contract as Void

Rochelle argues that the trial court erred when it denied her motion in limine to exclude the contract as void because the contract was illegal and unconscionable. Rochelle asks this court to declare the contract void based on de novo review.

Rochelle misstates the applicable standard of review. We review the trial court's evidentiary decisions under the abuse of discretion standard. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1311.) If a party establishes an abuse of discretion, we then determine whether he or she suffered any possible prejudice. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1058.) The trial court made an evidentiary decision to deny Rochelle's motion in limine to exclude the contract as void. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281.) Accordingly, the initial step of our inquiry is to determine whether the trial court abused its discretion in declining to find the contract void as illegal or unconscionable. We turn to the question of illegality first.

1. *Illegality*

Rochelle argues the contract is illegal because it provided that if she should "fail to timely vacate the subject premise [*sic*] on or before July 8th, 2014," then she "must refund the full $25,000 immediately and a lawsuit shall be immediately filed to effect the summary removal therefrom." She argues that this provision is illegal for two reasons: (1) it required her to forfeit monies that Deng was obligated to pay her under the law; and (2) it contemplated "summary removal" that violated unwaivable protections of Code of Civil Procedure section 1161.

Neither argument is persuasive. First, the contract did not require Rochelle to forfeit monies that she would be legally owed if she did not move out by July 8th and Deng had to recommence eviction proceedings. Instead, the contract stated that Rochelle would have to return the $25,000 payment if she did not perform her obligation to move out by July 8th. The contract did not foreclose the possibility that Deng would be legally required to make some other payment to Rochelle if she failed to move out in time and Deng had to pursue summary removal.

Second, the provision does not state that Rochelle would be summarily removed if she did not move out in time. Instead, it states that Deng would file a *lawsuit* "to effect the summary removal . . . ." Rochelle does not explain how this provision violates her rights under Code of Civil Procedure section 1161, which sets forth what must be shown to find a tenant guilty of unlawful detainer. (Code Civ. Proc., § 1161.) Even if she did, Rochelle does not sufficiently rebut the argument that she waived those rights. Rochelle cites *Gersten Companies v. Deloney* (1989) 212 Cal.App.3d 1119 for the proposition that the provisions of section 1161 are unwaivable. In that case, however, the court explained that a tenant cannot waive such provisions *in a rental agreement*. (*Id.* at p. 1128, citing Civ. Code, § 1953, subd. (a)(3) ["Any provision of a lease or rental agreement of a dwelling by which the lessee agrees to modify or waive any of the following rights shall be void as contrary to public policy"].) This rule does not apply here because the contract is not a rental agreement or a lease. Indeed, courts have found antiwaiver provisions inapplicable to other kinds of agreements. (E.g., *Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 745 [concluding move-out provision in settlement agreement did not violate antiwaiver provision in Rent Ordinance]; *Geraghty*

v. Shalizi (2017) 8 Cal.App.5th 593, 599 [explaining Rent Ordinance did not prohibit waiver of rights in a negotiated buyout agreement].)

We conclude that Rochelle has not shown the trial court abused its discretion in declining to find the contract void as illegal.[2] We now turn to the question of unconscionability.

2. *Unconscionability*

Unconscionability has two aspects: a "procedural" element that focuses on oppression or surprise and a "substantive" element that focuses on overly harsh or one-sided results. (*Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020, 1035.) Rochelle argues that the contract is unconscionable because there was an "absence of real negotiation" and a "lack of meaningful choice" when she signed the contract with Deng. Rochelle cites two cases for these general tenets of unconscionability, but neither supports her argument that the trial court abused its discretion here.

In *Lanigan*, the court determined that a settlement agreement was not unconscionable because it was "not adhesive, oppressive, or a surprise" to the plaintiff (procedural unconscionability) and because it was not "unfairly one sided" (substantive unconscionability) as the plaintiff gained employment protection through the agreement. (*Lanigan v. City of Los Angeles*, *supra*, 199 Cal.App.4th at pp. 1035–1036.) In *Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329–1331, the court determined that an employee arbitration agreement was unconscionable because the employees had no opportunity to negotiate the terms and were pressured to sign that same day (procedural unconscionability), and because the obligation

[2] Having rejected Rochelle's arguments that the "summary removal provision" is illegal, we need not address her contention that the "taint of illegality" from this provision supports voiding the entire contract.

to arbitrate under the agreement was only one-sided (substantive unconscionability). Here, Deng testified that Rochelle approached him about a move-out payment and proposed the payment amount of $25,000. Rochelle testified that she had previously been a property owner and a landlord. The contract provided benefits to both parties: Rochelle would receive a $25,000 payment and Deng would recover the unit by July 8th. This evidence does not show oppression, surprise, or results that are overly harsh or one-sided. Rochelle has not shown the trial court abused its discretion in declining to find the contract void as unconscionable.[3]

B. Methodology of Damages Expert

Rochelle argues that the trial court made a second evidentiary error when it denied her motion in limine to exclude the testimony of Deng's economic damages expert, Eric Drabkin, because his methodology was contrary to law. As with the contract issue above, the first step of our inquiry is whether the trial court abused its discretion in declining to exclude this expert testimony. (*People v. Seumanu*, *supra*, 61 Cal.4th at p. 1311; *People v. Wallace*, *supra*, 44 Cal.4th at p. 1058.)

Rochelle argues that Drabkin's methodology was contrary to law because he performed an out-of-pocket calculation of Rochelle's economic damages by comparing her rent in Oakland to the rent she would have been paying if she had stayed in the unit on 25th Avenue. Rochelle argues that the legally correct damages calculation was offered by her expert Richard Devine, who compared the rent she was paying for the unit on 25th Avenue to the market rental value of the unit.

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[3] Because Rochelle did not establish abuse of discretion on this contract issue, we need not proceed to the second step of the inquiry as to whether Rochelle suffered any prejudice. We deny Rochelle's alternative request that the matter "be remanded for further consideration" on the same basis.

We considered this same methodology issue with the same experts in *DeLisi v. Lam* (2019) 39 Cal.App.5th 663. In that case, Devine testified for the plaintiff tenants and calculated their economic damages using the market rental value methodology. (*Id.* at p. 679.) Drabkin testified for the defendant landlord and used the out-of-pocket methodology. (*Id.* at p. 680.) The landlord asked the trial court to rule on which measure of damages it would allow rather than allowing both to be presented to the jury. (*Id.* at p. 682.) The trial court declined to do so. (*Id.* at pp. 682–683.) On appeal, the landlord argued that the trial court erred because the only appropriate measure of damages was Drabkin's out-of-pocket methodology. (*Id.* at p. 680.) We agreed with the trial court, reasoning that its role as gatekeeper under Evidence Code sections 801 and 802 does not involve choosing between competing expert opinions, and thus it was "for the jury, not the court, to decide between the competing expert witnesses' views as to the appropriate measure of what the tenants had lost with respect to rent." (*Id.* at pp. 682–683.)

Here, we agree with the trial court for the same reasons. Rochelle cites three cases to support Devine's methodology, but none rejects Drabkin's methodology as contrary to law. (*Beeman v. Burling* (1990) 216 Cal.App.3d 1586, 1600; *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 926; *Castillo v. Friedman* (1987) 197 Cal.App.3d Supp. 6, 20.) Drabkin himself has been permitted to testify as to this out-of-pocket methodology in previous cases. (*DeLisi v. Lam*, *supra*, 39 Cal.App.5th at p. 680.) As in *DeLisi*, the trial court allowed both Drabkin and Devine to present their competing expert views to

the jury. (*Ibid.*) Rochelle has not shown the trial court abused its discretion in declining to exclude Drabkin's testimony.[4]

II. INSTRUCTIONAL ERROR ARGUMENTS

A. Relative Move In Jury Instruction

Rochelle argues that the trial court made an instructional error when it omitted the ordinance language "without ulterior reasons and with honest intent" from the "San Francisco Rent Ordinance: Relative Move In" jury instruction.

"We review challenges to the propriety of jury instructions in correctly stating the relevant law under the de novo standard of review." (*Collins v. Navistar, Inc.* (2013) 214 Cal.App.4th 1486, 1500.) The initial step of our inquiry is to determine whether the omission was instructional error. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573.) If we determine there was an instructional error, we must then assess whether the erroneous instruction was prejudicial and thus warrants reversal. (*Id.* at p. 574.) We begin with the question of error.

1. *Omission of Ordinance Language*

Rochelle cites *Formosa v. Yellow Cab Co.* (1939) 31 Cal.App.2d 77 for her argument that the omission was instructional error because statutory language should be quoted verbatim. But in *Formosa*, the court recognized the role of the trial court to address statutory language that may confuse the

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[4] Because Rochelle did not establish abuse of discretion on this expert testimony issue, we need not proceed to the second step of the inquiry as to whether Rochelle suffered any prejudice. We also note we do not find the argument compelling. (Cf. *Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1493–1494 [concluding plaintiff could not have been prejudiced by order granting motion in limine to exclude evidence on damages because jury never reached the issue of damages and it was speculative to argue the evidence would have affected the jury's finding on liability].)

jury: "Instructions based on code provisions should follow the wording of the particular section involved, and when confusing or couched in legal terms should be explained . . . . It is incumbent upon the trial court to determine whether or not a code section should be explained." (*Id.* at p. 84.) The trial court may also omit statutory language to avoid jury confusion. (See *Harris v. Belton* (1968) 258 Cal.App.2d 595, 615 [explaining that elimination of superfluous statutory definitions "demonstrates how a diligent judge can aid a jury by presenting a simple, clear and understandable statement of the applicable law"].)

Rochelle draws analogies to the facts of several cases to argue that the omission of statutory language was instructional error here. We do not find them persuasive. In *Richman v. San Francisco etc. Railway* (1919) 180 Cal. 454, the trial court instructed the jury that if it found Richman to have permanent injuries stemming from a railroad wreck, it should allow future damages if the evidence showed such injuries were " 'reasonably probable' " to result in the future. (*Id.* at p. 458.) The Supreme Court determined this phrase was clearly erroneous, as Civil Code section 3283 provided future damages for detriment "certain" to result in the future. (*Id.* at pp. 459–460.) Unlike *Richman*, the trial court here did not provide an instruction that misstated the law.

In *Godwin v. LaTurco* (1969) 272 Cal.App.2d 475, the trial court advised the jury that it would have to decide whether a collision of vehicles " 'was caused by a failure of Mrs. LaTurco to use ordinary care in making her left turn' " but refused to include an instruction on proximate cause. (*Id.* at p. 478.) The court determined that this refusal was prejudicial error. (*Id.* at p. 479.) In *Chapman v. Enos* (2004) 116 Cal.App.4th 920, the trial court modified the definition of "supervisor" in a BAJI jury instruction for an

employee's action for sexual harassment and retaliation. (*Id.* at pp. 922, 929.) The court determined that this modification was an error because it added elements to the definition of "supervisor" and thus improperly narrowed the class of individuals subject to liability as supervisors. (*Id.* at pp. 930–931.) Unlike *Godwin* and *Chapman*, the trial court here did not modify the Relative Move In jury instruction in a way that limited the statutory requirement that a landlord seek to recover possession "in good faith." (S.F. Admin. Code, ch. 37, § 37.9, subd. (a)(8).)

Here, we agree with the trial court's reasoning that the more specific phrase "without ulterior reasons and with honest intent" is encompassed by the general phrase "in good faith." (*Ibid.*) Accordingly, we reject Rochelle's argument that the inclusion of this specific phrase would have provided her with two additional bases to prove a violation of the Rent Ordinance.[5]

We also agree with the trial court that the phrase "without ulterior reasons and with honest intent" would have been confusing to the jury here, in light of the two instructions it received on section 37.9 of the Rent Ordinance. The Relative Move In instruction stated that a landlord must act "in good faith" when seeking to recover possession of a rental unit to move in a relative. The Definition of Dominant Motive instruction stated that the reasons in the eviction notice must be the landlord's "dominant motive" for recovering possession of the rental unit. If the jury instructions had included both the "without ulterior reasons" language and the "dominant motive" language, it would have confused the jury. (See *People v. Burgener* (1986) 41

[5] Rochelle has not argued, in the trial court or on appeal, that the specific phrase should have been included because it defines the term "good faith." We also note we do not find the argument compelling, as the terms "without ulterior reasons" and "with honest intent" do not supply the definition of what constitutes "good faith"; they are surplusage.

Cal.3d 505, 538 ["It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction"].)

Together and as given, the Relative Move In instruction and Dominant Motive instruction included both requirements regarding a landlord's state of mind under the Rent Ordinance: (1) that Deng act in "good faith" to recover possession of the unit through a relative move-in eviction; and (2) that Deng's "dominant motive" was to move in his mother when seeking to recover possession. (S.F. Admin. Code, ch. 37, § 37.9, subds. (a)(8)(ii), (c); see *DeLisi v. Lam*, *supra*, 39 Cal.App.5th at pp. 675–676.) The instructions conveyed the import of these state of mind requirements: that "[t]he stated ground for the eviction must in fact be the actual reason the landlord is seeking possession of the unit and not a pretext for some other motivation." (*DeLisi v. Lam*, at p. 674; see *Reynolds v. Lau* (2019) 39 Cal.App.5th 953, 964 [explaining that section 37.9, subdivision (a)(8) does not "trigger a wide-ranging inquiry into the general conduct and motivations of an owner" but instead serves "a specific function—to determine whether the owner harbors a good-faith desire" in seeking to recover possession of a unit].)

We conclude that the trial court did not err by omitting the statutory phrase "without ulterior reasons and with honest intent" from the Relative Move In jury instruction to avoid jury confusion.

2. *Any Error Was Not Prejudicial*

Even assuming the omission was instructional error, Rochelle's argument would fail on the second step of the inquiry: prejudice. (*Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 574.) An erroneous instruction is prejudicial error only if it seems " ' "probable that the jury's verdict may have

been based on the erroneous instruction . . . .” ’ ” (*Ibid.*, quoting *LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 875.) Rochelle bears the burden to show a reasonable probability that, in the absence of the error, a result more favorable to her would have been reached. (*Soule*, at p. 574.) “Actual prejudice must be assessed in the context of the individual trial record. . . . Thus, when deciding whether an error of instructional omission was prejudicial, the court must also evaluate (1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel’s arguments, and (4) any indications by the jury itself that it was misled.” (*Id.* at p. 580.)

Here, the relative move-in eviction notice was admitted as a trial exhibit. It included the entire phrase from section 37.9, subdivision (a)(8) of the Rent Ordinance: “in good faith, without ulterior reasons and with honest intent.” In closing argument, Rochelle’s counsel pointed to this specific text in the eviction notice. He argued that Deng “said in the notice he had no other ulterior reasons and he was being honest about it, but that was not a true representation.” He argued that the Rent Ordinance contains “requirements” that a relative move-in “be done honestly” and that landlords are “doing it in good faith, that’s their main reason, and they intend to do that.” These arguments weigh against the determination of prejudice here. (See *Morales v. 22nd Dist. Agricultural Assn.* (2016) 1 Cal.App.5th 504, 529–530 [explaining that where court comments during trial and counsel’s closing argument covered proposed jury instruction, any error in not giving the instruction was not prejudicial].)

Moreover, Rochelle has not presented any evidence that the jury was misled by the Relative Move In instruction. The jury submitted multiple questions to the trial court, but none of those questions was related to the Relative Move In instruction (or the Dominant Motive instruction). Instead,

the special verdict shows consistency across the jury's findings regarding Deng's state of mind. On Rochelle's claim for violation of section 37.9 of the Rent Ordinance, the jury found that Deng sought to recover possession of the apartment in good faith with the relative move-in notice. On Rochelle's claim for intentional misrepresentation, the jury found that Deng's representation related to the claimed termination of tenancy (moving in his mother) was not false. On Rochelle's claim for violation of section 37.10 of the Rent Ordinance, the jury found that Deng did not, in bad faith, influence or attempt to influence Rochelle to vacate the unit through fraud, intimidation or coercion. These findings weigh against the likelihood that Rochelle would have achieved more favorable results if the omitted ordinance phrase had been included in the Relative Move In jury instruction.

In sum, while we conclude that there was no instructional error, any such error was not prejudicial.

B. Response to Jury Question

Rochelle argues that the trial court made a second instructional error by providing the following response to a jury question regarding the effect of the contract on the eviction: "If the contract was mutually agreed upon, then the eviction proceedings terminated on the date of the contract. Please answer all of the questions on the verdict form." We review the response to a jury question for abuse of discretion. (*People v. Eid* (2010) 187 Cal.App.4th 859, 881–882.)

Rochelle argues that the trial court erred in its response for two reasons. Neither is persuasive. First, Rochelle cites *Pelletier v. Alameda Yacht Harbor* (1986) 188 Cal.App.3d 1551 for the proposition that the contract did not terminate the eviction. But *Pelletier* does not support this proposition. It held: "[A] stipulated judgment of unlawful detainer had no

collateral estoppel effect as to a subsequent cause of action for retaliatory eviction." (*Id.* at p. 1553.) This holding relates to the availability of claims arising from an eviction, not the termination of eviction proceedings. (*Ibid.*)

Second, Rochelle argues that the response directed the jury to ignore her defenses of undue influence and fraud when considering the contract issue. We disagree, as the response specifically directed the jury to answer all the questions on the verdict form. The verdict form included questions as to whether Rochelle's consent to the contract was obtained by unfair pressure or fraud.

We conclude the trial court did not abuse its discretion in its response to this jury question.[6]

III. DECISIONAL ERROR ARGUMENTS REGARDING JURY MISCONDUCT

Rochelle argues that the trial court erred when it denied her motion for new trial on the ground of jury misconduct. In evaluating such a motion, the trial court must undertake a three-step inquiry. (*Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 345.) First, it must determine whether the affidavits supporting the motion are admissible. (*Ibid.*) Second, if the affidavits are admissible, the court must determine whether the facts stated therein establish misconduct. (*Ibid.*) Third, assuming misconduct, the trial court must determine whether the misconduct was prejudicial. (*Ibid.*)

Rochelle argues that the juror affidavits she submitted show four types of jury misconduct: (1) juror No. 3 refused to deliberate; (2) juror No. 12 discussed contracts and contract law; (3) juror No. 12 made an extraneous

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[6] Having determined no abuse of discretion as to the response to the jury question, we need not address Rochelle's argument that she suffered prejudice. We also note that we do not find it compelling, as the response specifically directed the jury to answer all questions on the verdict form.

statement of law; and (4) multiple jurors referenced testimony that had been stricken from the record.

As detailed below, we begin our review on this first step of admissibility and conclude that the trial court abused its discretion only as to the portions of the affidavits related to an extraneous statement of law and references to stricken testimony. On the second step of the inquiry, however, we conclude that the facts stated in those portions of the affidavits do not establish jury misconduct. Given this conclusion, we do not reach the third step of the inquiry regarding prejudice.

A. Admissibility of Juror Affidavits

In denying Rochelle's motion for new trial based on jury misconduct, the trial court found that the juror affidavits submitted by Rochelle were inadmissible under Evidence Code section 1150. We review this finding under the abuse of discretion standard. (*Barboni v. Tuomi*, *supra*, 210 Cal.App.4th at p. 345.)

Evidence Code section 1150, subdivision (a) provides: "Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly." But "[n]o evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (*Ibid.*) Evidence Code section 1150 thus provides that a juror statement made during deliberations may be admissible, but only to the extent it shows "proof of overt acts, objectively ascertainable," and not "proof of the subjective reasoning processes of the individual juror, which can be neither corroborated nor disproved . . . ."

(*People v. Hutchinson* (1969) 71 Cal.2d 342, 349.) Accordingly, we must determine whether the four statements described in the juror affidavits—refusal to deliberate, discussion of contracts and contract law, extraneous statement of law, and references to stricken testimony—show overt acts or subjective reasoning processes. We address each in turn.

1. *Refusal to Deliberate by Juror No. 3*

The affidavits submitted by Rochelle state that juror No. 3 "continued to repeat his belief that Ms. Rochelle had signed a document and that that meant that Mr. Deng could do whatever he wanted with his property" and that "the eviction did not matter anymore, once Ms. Rochelle signed the contract." The affidavit from juror No. 5 describes how, when he asked if the jury could reconsider some of the previous questions on the verdict form, juror No. 3 made a similar statement. Rochelle argues that these statements indicate juror No. 3's refusal to deliberate.

These portions of the affidavits go directly to juror No. 3's subjective reasoning and thought process as to why Deng was not liable: The parties had entered into a contract. Juror affidavits are inadmissible where they evidence a juror's thought processes on liability. (See *Lankster v. Alpha Beta Co.* (1993) 15 Cal.App.4th 678, 681, fn. 1 [concluding declaration was inadmissible to the extent it purported to explain juror's subjective reasoning about why defendant could not be liable].) Juror No. 5's feelings about these statements are similarly inadmissible. (See *Bandana Trading Co., Inc. v. Quality Infusion Care, Inc.* (2008) 164 Cal.App.4th 1440, 1446 (*Bandana*) [concluding trial court properly disregarded statements in declaration that jurors felt discouraged from asking questions and rushed into deciding on a verdict].) The trial court did not abuse its discretion in finding these portions of the affidavits inadmissible.

2. *Discussion of Contracts and Contract Law by Juror No. 12*

The affidavit from juror No. 5 described a statement by juror No. 12 (an attorney who served as the jury foreperson) on the last day of jury deliberations: " 'Contract Law, is very clear. It's the foundation of a functioning society and the ability of people to enter into contracts and contract negotiations . . . .' " (*Sic.*)

This purported statement is not a statement of law. It is commentary that reflects more generalized knowledge and experience that is not limited to the expertise of an attorney. (See *Bandana*, *supra*, 164 Cal.App.4th at p. 1447 [explaining that juror with accounting expertise was "entitled to rely on [her] general knowledge and experience in evaluating the evidence"].) It also reflects the mental processes by which juror No. 12 arrived at the verdict. (See *People v. Elkins* (1981) 123 Cal.App.3d 632, 638 ["The subjective quality of one juror's reasoning is not purged by the fact that another juror heard and remembers the verbalization of that reasoning"].) The trial court did not abuse its discretion in finding this portion of the affidavit inadmissible.

3. *Statement of Law by Juror No. 12*

The affidavit from juror No. 5 also described the following: Within minutes of starting jury deliberation, juror No. 12 was asked, " '[D]oes a contract supersede the eviction notice? Isn't it all over if she signed a contract?' " Juror No. 12 responded, " '[Y]es, a signed contract superseded the eviction and made the eviction notice moot.' "

Jury misconduct may arise when "extraneous law enters a jury room—i.e., a statement of law not given to the jury in the instructions of the court . . . ." (*In re Stankewitz* (1985) 40 Cal.3d 391, 397.) In *Stankewitz*, the defendant obtained two juror declarations describing how another juror had advised others that he had been a police officer and knew the law and then

proceeded to misstate the law during deliberations. (*Id.* at p. 396.) The Supreme Court explained that statements reflecting jury deliberations "must be admitted with caution" because they "have a greater tendency than nonverbal acts to implicate the reasoning processes of jurors" and are "therefore more apt to be misused by counsel in an effort to improperly open such processes to scrutiny." (*Id.* at p. 398.) But ultimately, it concluded that the affidavits were admissible because "no such misuse is threatened when, as here, the very making of the statement sought to be admitted would itself constitute misconduct." (*Ibid.*; see *People v. Hedgecock* (1990) 51 Cal.3d 395, 419 ["In rare circumstances a statement by a juror during deliberations may itself be an act of misconduct, in which case evidence of that statement is admissible"].) Similarly, in *Lankster v. Alpha Beta Co.*, *supra*, 15 Cal.App.4th at p. 681, fn. 1, the plaintiff submitted two juror declarations describing how one of the jurors had conducted her own investigation and misstated the law on liability as to the defendant. The court found these portions of the declarations admissible.

Here, the purported statement by juror No. 12 that " 'a signed contract superseded the eviction and made the eviction notice moot' " is a statement of law that was not included in a specific jury instruction. We thus conclude that this is one of the rare circumstances where this statement *may* be an act of misconduct itself, and thus the trial court abused its discretion in finding this portion of the affidavit inadmissible.

4. *References to Stricken Testimony*

The affidavits from juror No. 5 and juror No. 6 state that multiple jurors referred to stricken testimony during deliberations. At trial, Deng testified that when Rochelle approached him about a move-out agreement, she initially asked for $100,000 and later negotiated to $25,000. The trial

court struck the testimony. The trial court had instructed the jury to disregard stricken testimony during its preliminary jury instructions.

Discussion of evidence that has been stricken or that the court has instructed the jury to disregard can constitute jury misconduct. (*People v. Johnson* (2013) 222 Cal.App.4th 486.) In *Johnson*, the jury was instructed not to discuss defendant's failure to testify. (*Id.* at p. 495.) Defendant's stepfather submitted a declaration stating that he spoke with several jurors after the verdict and " 'at least half of the jurors . . . raised the question if he is innocent why he didn't take the stand to defend himself.' " (*Ibid.*) The court determined that "the mere making of such a statement in the jury room was an overt act of misconduct and admissible as such" and the trial court abused its discretion in disregarding this evidence. (*Ibid.*)

Here, we similarly conclude that the affidavits from juror No. 5 and juror No. 6 describe references to stricken testimony during jury deliberations that *may* establish misconduct, and thus the trial court abused its discretion in finding these portions of the affidavits inadmissible.

Having determined on this first step of the inquiry that the portions of the affidavits describing the purported statement of law and references to stricken testimony are admissible, we turn next to review of the second step: whether the facts stated in those portions of the juror affidavits establish jury misconduct.

B. No Jury Misconduct

Rochelle argues that the trial court erred in this second step of the inquiry by not finding jury misconduct based on the affidavits from juror No. 5 and juror No. 6. As the moving party, Rochelle bore the burden of showing facts that establish juror misconduct. (*Barboni v. Tuomi*, *supra*, 210 Cal.App.4th at p. 345.) Our inquiry on this second step is "whether those

facts constitute misconduct, a legal question we review independently." (*People v. Collins* (2010) 49 Cal.4th 175, 242.)

As to the purported statement of law by juror No. 12, Deng submitted an affidavit from juror No. 12 declaring that he never made any such statement. Instead, juror No. 12 declared that he "instructed the jury to direct that question to the judge and signed the juror form making that request." The fact that juror No. 12 submitted this question (and many others) to the trial court contradicts the proposition that he would assert his own statement of the law. Even if he did state that the contract " 'superseded the eviction and made the eviction notice moot,' " it was entirely consistent with the trial court's response to the jury question: The contract terminated the eviction proceedings. We thus conclude that Rochelle did not meet her burden to establish jury misconduct by this purported statement of law. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1264–1265 [concluding no misconduct where jurors' understanding of a life sentence was consistent with jury instruction on meaning of life without parole].)

As to the juror references to stricken testimony, the affidavits from both juror No. 5 and juror No. 12 acknowledge that such references were made during jury deliberations. The affidavit from juror No. 12, however, declares that whenever that testimony was referenced, he admonished his fellow jurors that it had been stricken and could not be considered. Based on our independent review of the facts as stated in affidavits from juror No. 5 and juror No. 12, we conclude that the admonishments described by juror No. 12 neutralize Rochelle's argument as to misconduct.[7] Rochelle did not

[7] We note that this conclusion is not inconsistent with the trial court's analysis. While the order denying the motion for new trial stated only that the affidavits submitted by Rochelle were inadmissible, the trial court announced its tentative ruling at the hearing that "even if they could be,

meet her burden to establish jury misconduct by references to stricken testimony.[8]

IV. CUMULATIVE EFFECT OF PREJUDICE ARGUMENT

While Rochelle argues that the trial court made evidentiary, instructional, and decisional errors that were individually prejudicial, she argues in the alternative that the "cumulative effect" of the errors warrants a new trial. Rochelle cites *Johnson v. Tosco Corp.* (1991) 1 Cal.App.4th 123 to support her argument. But in that case, the court concluded that the cumulative effect of three different errors was prejudicial: an erroneous jury instruction, a misleading jury instruction, and the sustaining of objections on expert witness testimony despite having denied a motion in limine to exclude the testimony. (*Id.* at pp. 140–141.)

Here, we have rejected the majority of Rochelle's arguments as to error. While we determined that the trial court erred in finding certain portions of the juror affidavits inadmissible, the error was harmless because Rochelle did not meet her burden to establish jury misconduct. Accordingly, there can be no cumulative effect of prejudice here.

[they] don't show juror misconduct." (See *Jie v. Liang Tai Knitwear Co.* (2001) 89 Cal.App.4th 654, 666–667 [explaining appellate court must view record in light most favorable to trial court and defer to both express and implied findings, and affirming denial of motion for new trial where trial court made an implied finding as to the credibility of the declarant].)

[8] Having determined Rochelle did not meet her burden to show jury misconduct on either basis, we need not address Rochelle's argument that she suffered prejudice. We deny Rochelle's alternative request to "remand this matter so that the trial court can consider the declarations" on the same basis.

V. ATTORNEY FEES ARGUMENT

Rochelle's argument on attorney fees is limited to one sentence: "Appellant also seeks to reverse the Attorneys fees order in the event the judgment is reversed or a new trial is ordered." Because we affirm the judgment and order denying motion for new trial, we will also affirm the amended judgment ordering attorney fees.[9]

DISPOSITION

The judgment, order denying motion for new trial, and amended judgment are affirmed. Deng is entitled to his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

[9] In light of this conclusion, we need not address Deng's argument that the judgment should be affirmed on the alternative ground that Rochelle's claims were barred by the litigation privilege.

_____
Jackson, J.

WE CONCUR:

_____
Fujisaki, Acting P. J.

_____
Petrou, J.